Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended	)	
By the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF THE LEAGUE OF MINNESOTA CITIES

I. Introduction

The League of Minnesota Cities[1] ("LMC") appreciates the opportunity to file comments on the Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. LMC strongly opposes the tentative conclusions in the FNPRM that cable-related in-kind contributions are franchise fees and that local governments have no authority regarding cable operators' use of the rights of way to provide non-cable services. It is the view of LMC that the tentative conclusions are contrary to the plain language of the Communications Act of 1934 as amended, (the "Act"). In addition, the tentative conclusions would be impractical for local governments to enforce and would create budgetary strain on local governments. For these reasons, LMC strongly opposes the FCCs's tentative conclusions that cable-related in-kind contributions are cable franchise fees subject to the five percent fee cap.

[1] LMC is a statewide cooperative association representing 833 cities, 11 townships, 61 special districts and one joint power entity. Only 20 cities in Minnesota do not belong to LMC. The LMC was established in 1913 within the school of public affairs at the University of Minnesota. It became an independent association representing and serving cities in 1974. A board of directors, elected by the LMC membership, govern LMC.

II. The Commission's Tentative Conclusions conflict with the Plain Language of the Act.

As part of granting franchises to cable companies, franchise authorities typically negotiate with a cable companies to term acceptable terms for a cable company's use of the public right-of-way. The eventual agreement between a franchising authority and a cable company balance the safe and efficient use of the public right-of-way with the needs of the cable company. These negotiations, which in some cases last for up to a year, result in agreements between a cable company and a franchising authority in which a cable company agrees to provide certain services such as intuitional networks, public channels, right-of-way relocation, and interconnected networks in exchange for agreed upon allowances from a city or other franchising authority. These services are defined as "in-kind contributions" but are negotiated contractual benefits and not a contribution. In exchange for these negotiated in-kind contributions, the cable company receives benefits from the local government unit. These benefits may include items such as preparation of the right-of-way for installation, relocation considerations, or conditions on competitors in the right-of-way. The negotiated in-kind benefits are separate from franchise fees imposed on a cable provider and should be kept as separate items.

Negotiated in-kind benefits are clearly outside the definition of a franchise fee under the Act. The Act defines a "franchise fee" to include any tax, fee or assessment of any kind imposed by the franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.[2] An in-kind benefit, is a negotiated and agreed upon benefit between a franchising authority and a cable operator. Negotiated in-kind benefits cannot be considered a franchise fee as they are not a tax, fee, or assessment. In-kind benefits

[2] 47 USC § 542 (g)(1).

vary depending on the franchise being granted. Franchise fees, on the other hand are virtually identical for any franchise granted by a franchising authority. The plain reading of the Act does not support a conclusion that negotiated terms of a franchise agreement can be considered a franchise fee, because they are not imposed by the franchising authority but rather negotiated between the parties.

One type of in-kind benefit that is negotiated between cable companies and franchising authorities is the providing of public, education, or government access ("PEG") services. For franchises granted after October 30, 1984, the Act recognizes that the capital costs required by a franchise to be incurred by a cable operator PEG facilities are not to be included in the definition of a franchise fee.[3] If Congress had intended for the fair market value of PEG facilities to be included in the definition of a franchise fee, Congress would have included that intent in the Act. The Commission should not now read into the Act language that is not clearly delineated.

The Act also clearly differentiates between franchise fees and in-kind benefits such as PEG services. Cities clearly have the right to "require adequate assurance that [a] cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."[4] This requirement to provide PEG facilities, as an example of a negotiated in-kind benefit, is clearly intended to be a separate requirement from that of a franchise fee.

The Act also differentiates between franchise fees and PEG facilities, as an example of an in-kind benefit, by allowing cable operators to bill subscribers for both franchise fees and PEG channels as separate line items.[5] If Congress had intended for negotiated in-kind contributions to be included in franchise fees, Congress would not have differentiated those items in the Act.

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[3] 47 USC § 542 (g)(2)(C).
[4] 47 USC § 541 (a)(4)(B).
[5] 47 USC § 542 (c).

When reading the Act as a whole, there is simply no way to conclude that Congress intended negotiated cable-related in-kind contributions to the statutory franchise fee cap. Congress has clearly recognized differences between PEG support, in-kind contributions, and franchise fees. A reading of the Act to include all these items as "franchise fees" is simply not supported by the plain language.

III. A Reading of the Act to Value In-Kind Contributions at Their Fair Market Value is Impractical to Calculate.

Valuing in-kind contributions at their "fair market value" and reducing franchise fees based on the value is an impractical proposition for both franchising authorities and cable operators. Often times, there is simply no way to determine the fair market value of an in-kind contribution. As stated above, these contributions are negotiated between the parties as part of a beneficial agreement for all parties. If cities and cable operators were to now be forced to determine the fair market value of all negotiated in-kind contributions, these negotiations would likely become much more complex and would make it more difficult to grant franchises to cable operators.

There is no clear way to determine the value of all the different types of in-kind contributions that are negotiated. The tentative conclusions of the Commission leave open the question of which party gets to determine the fair market value of these contributions? Determining this question would likely result in a more difficult negotiating process for all franchises.

Finally, the tentative conclusions fail to take into consideration negotiated benefits a cable operator receives from a franchising authority in exchange for an in-kind contribution. Negotiated in-kind terms of a franchise agreement benefit all parties to that agreement. The Commission's tentative conclusions only allow cable companies to benefit by reducing franchise fees based on the amount of in-kind benefits they provide to cities and other franchising

authorities. The tentative conclusions do not take into consideration any benefits franchising authorities give to cable companies as part of the negotiated agreement. There is an general legal assumption that all the parties to a franchise agreement receive fair and equitable terms. It is not proper for the FCC to change those agreed upon terms in a manner that would only benefit the cable operators. Due to the complexity of franchise agreement negotiations, there is simply no practical way for franchising authorities and cable providers to determine the fair market value of negotiated in-kind contributions.

IV. Offsetting Franchise Fees by In-Kind Contributions Would Have a Detrimental Impact on City Budgets.

Cities negotiate franchise agreements on a fair and level playing field with cable operators. When both sides come to an agreement, they are then able to rely on that agreement and plan for the future. If franchise fees are now suddenly reduced by the fair market value of negotiated in-kind contributions, cities will be forced to make up that lost revenue through general tax dollars.

Currently, cable operators can off-set the costs of these in-kind contributions by line item charges to their subscribers as authorized by the Act. Cities do not have a similar ability to charge residents for these contributions other than through an increase in the tax levy or by eliminating the public benefits provided by the in-kind contributions. By adding in-kind benefits to the franchise fee cap, residents of Minnesota cities will be the ones forced to cover the lost revenue that cities have planned on for years.

V. Conclusion

On behalf of our members, LMC strongly disagrees with the Commission's tentative conclusions relating to the treatment of cable-related in-kind contributions as franchise fees.

Such a conclusion is not consistent with the plain language of the Communications Act and would have deferential effect on cities through Minnesota and around the country.

Respectfully submitted,

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